Filed 3/8/10 In re O.M. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re O.M., a Person Coming Under the Juvenile Court Law.	
CONTRA COSTA COUNTY CHILDREN AND FAMILY SERVICES BUREAU, Plaintiff and Respondent, v. A.E., et al. Defendants and Appellants.	A125649 (Contra Costa County Super. Ct. No. JO7-01947)

I. INTRODUCTION

This case purports to be an appeal from the juvenile court's June 2, 2009, order denying defendant and appellant A.E.'s (Father) petition filed under Welfare and Institutions Code section 388.[1] Father's Notice of Appeal, however, states that his appeal is taken only from an order dated July 21, 2009, terminating his parental rights pursuant to section 366.26. Because Father's Notice of Appeal omits any reference to the June 2, 2009, order denying his section 388 petition, and because his sole contention on appeal is that the juvenile court erred in denying his section 388 petition, we dismiss this appeal, which we do not have jurisdiction to consider.

[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise noted.

II. FACTUAL AND PROCEDURAL BACKGROUND

In Appeal No. A124494 we denied C.W.'s (Mother) writ petition, which challenged the juvenile court's order terminating reunification services she was offered by plaintiff and respondent, Contra Costa County Children and Family Services Bureau (Bureau), pursuant to section 361.5 and to set a permanency planning hearing pursuant to section 366.26. (*C.W. v. Superior Court* (A124494, July 16, 2009) [nonpub. opn.].)

The following facts are taken from that opinion: The child in this case, O.M., was born a month after Mother was convicted of substance abuse charges and sentenced to two years in prison and while she was incarcerated at a Family Foundations Residence. When Mother began to display paranoid and isolating behaviors, Mother was transported to the California Women's Institute Facility in Corona, California and placed on a two-week mental health hold. She did not provide the name of a caregiver to look after O.M. The Bureau filed a petition alleging the absence of a caregiver, and Mother's incapacity and failure to protect based on her severe and chronic substance abuse history.

At a jurisdictional and dispositional hearing held on January 24, 2008, Mother submitted to the allegations of the petition and O.M. was adjudged a dependent child under sections 300, subdivision (b) and (g). At that time, a Family Reunification Plan was ordered.

Mother's reunification plan had as its goal O.M.'s return to her. Among other things, Mother was required to "complete a mental health assessment arranged through Contra Costa County Mental Health or other Mental Health provider" and to "sign necessary releases of information regarding previous Mental Health treatment and follow all recommendations resulting from that assessment." The record indicates that Mother could request this assessment while in prison or it could be deferred until her release. A memo written by Mother's counsel explained that "as of the date of disposition, there was an agreement based on a discussion amongst counsel for mother, counsel for the child and for the Bureau, that the evaluation would be procured by mother and mother's counsel. Specifically the on-the-record statement by mother's counsel that if mother or mother's counsel could not get the evaluation done, or done to the Bureau's satisfaction,

the evaluation would be deferred until mother was released from prison. Counsel met and conferred on 1/24/8 and came to this agreement so that disposition could proceed on that day. This was done at mothers request."

A contested six-month status review hearing was held on July 23, 2008. Mother reported having attended computer classes, and a 12-step recovery program, but she had not verified her attendance, despite a request that she do so. During this same time period, Mother had twice monthly half-hour no contact visits with O.M. Mother reported that she would like contact visits and that she was prepared to enter a substance abuse residential program when she came out of detention. (Mother was scheduled for release in November 2008.) The Bureau recommended termination of family reunification services because it could not "state that [O.M.] would be safe in the care of his mother." The Bureau recited Mother's "significant history of substance abuse, domestic violence, mental health instability, criminal activity, and involvement with the Bureau" as well as Mother's "demonstrated pattern of not following through with court orders or treatment." The Bureau concluded that based on this history "it is likely that her treatment would take a significant amount of time to begin to address the issues of [O.M.'s] safety in her care. At this time, despite [Mother]'s stated participation in services available . . . while incarcerated she has not made an impact on the issue that need[s] to be addressed to insure that [O.M.] would be safe in her care." The Bureau also noted that although Mother "has stated on several occasions that she had a completed Mental Health Evaluation performed while incarcerated at Chowchilla Women's Prison," the social worker was unable to obtain a copy of the report despite a signed release obtained from Mother. Apparently, the Chief Psychologists would not release the report to the Bureau, despite the release and the efforts of Mother's attorney to obtain a copy of the report.

Despite this recommendation, the court found a substantial probability of return and ordered six more months of Family Reunification Services. An updated Case Plan was circulated. Mother did not appeal from this order.

The 12-month status review hearing was held on February 26, 2009, after a number of continuances. A forensic psychological examination of Mother was conducted

and a report regarding this evaluation was issued on September 29, 2008. The evaluating psychologist noted that Mother "presents with many of the features of developing or prodromal paranoid schizophrenia. No matter the exact diagnosis, she is a severely disturbed woman who struggles with substance abuse, paranoid thinking, and a formal thought disorder." The "alcohol recovery issues-issues which have not been formally and aggressively treated for any extended period of time. Her love for her son was obvious and genuine in clinical interview; her inability to meet the psychological and developmental needs of any child, at this time, is just as obvious based on test results and interview." The psychologist recommended that Mother be placed in "a dual diagnosis program which can address both her alcohol use and mental health issues. It is imperative that this program have the sophistication to deal with more severe mental illness such as schizophrenia." The outlook, even with such treatment was, according to the psychologist, not good: "It is possible that even with aggressive treatment and a positive response to psychotropic medication [Mother] will never be psychologically capable of the daily demands and stress of mothering or parenting; it shall require all her psychological resources just to manage her daily life and maintain her sobriety." He recommended that Mother be reevaluated in two years. The Bureau recommended that services be terminated and a 366.26 hearing be held.

At a contested review hearing held on February 26, 2009, the court found that reasonable services had been provided and set a section 366.26 hearing.

Despite numerous efforts by the Bureau to contact Father after Mother identified him as the alleged father, Father did not respond to the Bureau until after Mother had already received six months of reunification services. On June 20, 2008, Father signed a statement to the effect that he did not know if he was O.M.'s father. He requested paternity testing. These documents were filed in October 2008, and an order for genetic testing was issued.

By late January 2009, the Bureau again reported that Father was no longer in contact with the Bureau and did not respond to letters sent to the address Father had given

the Bureau. The genetic testing report, dated February 5, 2009, revealed that Father was O.M.'s biological father.

On February 26, 2009, the juvenile court set the matter for a section 366.26 hearing, Mother filed a writ petition, which we denied in our previous opinion in this matter (*C. W. v. Superior Court, supra,* [nonpub. opn.]) and Father filed a notice of intent to file a writ petition. He filed this notice on March 9, 2009. He did not, however, timely file a petition and the filing of the record was stricken.

At a hearing on April 13, 2009, Father sought to have his status changed to presumed father. His attorney indicated that he wished to reunite with O.M. The Bureau objected, pointing out that Father had been aware of the proceedings involving O.M. since June 2008. The court denied the request. The court also pointed out to counsel that "as a biological father, he can, in fact, petition the Court by way of a 388." The court also pointed out that the 366.26 hearing was scheduled for June 16, 2009, and therefore father "has a little over two months . . . to do whatever he needs to do."

On May 26, 2009, Father, who was at that time incarcerated in San Francisco County Jail, filed a section 388 petition. He requested that reunification services be provided him and that this change would be in O.M.'s best interests because he "would have a relationship with father and extended family." He alleged, as new information that he was not removed for [the February 26, 2009 hearing in which the court set the matter for an implementation hearing]. His attorney's request for presumed status was denied on April 13, 2009. She had been assigned the matter on April 9, 2009. "[Father] has consistently requested services and placement with family after he found out that he was the biological father. [Father] has been accepted into Discovery House and should begin in July.

The court denied the request on May 26, 2009, as not stating new evidence or a change of circumstance. The court did not order a hearing. For reasons that are not clear to us, the court again denied this request for the same reasons in an order dated June 2, 2009.

On May 28, 2009, Father filed a second section 388 petition. This petition alleged identical "new information." The court denied this petition on May 29, 2009. Father did not appeal either of these denials.

On July 21, 2009, the court held a hearing section 366.26 hearing. At that time Father's attorney, who had visited Father in jail, stated that Father "told me how much he wanted a relationship with his child. He feels that he was not really afforded the proper notice during the progress of this case. [¶] He objects very much to the termination of his parental rights."

The court found that appropriate notice had been given, that there was clear and convincing evidence that O.M. would be adopted, that it would be detrimental to return O.M. to his parents' custody and that the termination of parental rights was in the best interest of O.M. The court further found that it had "considered any relationship with the parents and child and find that the child being in a loving, stable, secure, permanent home far outweighs any . . . benefits of the relationship with the parents today." The court informed Father, who was present at the hearing, of his appellate rights.

On July 27, 2009, Father filed a notice of appeal from the order terminating his parental rights on July 21, 2009.

DISCUSSION

Father's sole arguments on appeal are that (1) the order denying his section 388 request that he be given reunification services should be reversed because Father did, in fact, demonstrate changed circumstances and that it would be in O.M.'s best interest to give Father reunification services and (2) that Father's due process rights were violated because the court did not grant his section 388 petition. Father asks this court to remand this matter to the juvenile court for a "full evidentiary hearing on the merits of father's section 388 petition." Mother joins in these arguments.

The order on father's section 388 petition was a separate appealable order. (*Nahid H. v. Superior Court* (1997) 53 Cal.App.4th 1051, 1068.) Father did not appeal from this order. Because Father failed to perfect an appeal of the section 388 petition we lack jurisdiction to consider it.

If a notice of appeal is ambiguous, there is a rule of law favoring a finding of appealability. (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 47.) But that rule "cannot apply where there is a clear intention to appeal from only part of the judgment or one of two separate appealable judgments or orders." (*Id*. at p. 47.) Here, Father's notice of appeal reveals a clear intention to appeal only from the juvenile court's order under section 366.21, subdivision (e).

Father, however, cites *In re Josiah S.* (2002) 102 Cal.App.4th 403 (*Josiah S.*) as providing us with authority to assume jurisdiction. This case, however, is inapplicable. In *Josiah S.*, the parent appealed from the denial of a contested hearing at a postpermanency review. On appeal, she argued that the juvenile court also erred by summarily denying her subsequent section 388 petition. The appellate court stated: "While a notice of appeal must identify the particular order being appealed [citation], and 'a notice of appeal will not be considered adequate if it completely omits any reference to the judgment being appealed' [citation], the circumstances here warrant liberal interpretation of appellant's notice of appeal which she prepared herself. The issues appellant attempted to raise in her section 388 petition relate back to material contained within the report prepared for the [six-month review] hearing, which was not received by appellant until the [postpermanency review] hearing. If she had been granted a contested hearing [at the postpermanency review hearing], additional evidence may have generated a result which would have made her [subsequent] section 388 petition unnecessary. Or, if the result had not changed, it may have generated further information which appellant could have used in connection with her section 388 petition." (*Josiah S., supra,* at p. 418.)

The equities that underlie the court's opinion in *Josiah S.* do not exist here. Moreover, the notice of appeal in this matter is unambiguous and we cannot construe it as including an appeal from the order, filed on an entirely different date, denying Father's section 388 petition. (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624-625.)

IV. DISPOSITION

The appeal is dismissed.

_____
Haerle, Acting P.J.

We concur:

_____
Lambden, J.

_____
Richman, J.